In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 767

ANTHONY CASTALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15–20; R. 147–151) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1964 (R. 152). The petition for a writ of certiorari was filed on December 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, because of petitioner's acquittal of conspiracy to violate the narcotic laws, he could not be

granted immunity and compelled to testify before a grand jury investigating possible violations of the narcotic laws related to the conspiracy with which petitioner had been charged.

2. Whether petitioner was constitutionally entitled to indictment and trial by jury in proceedings for contempt of court under Rule 42(b) of the Federal Rules of Criminal Procedure.

3. Whether the district court could constitutionally sentence petitioner to two years' imprisonment for contempt of court following a nonjury contempt hearing.

STATEMENT

In September 1963, a grand jury was convened in the Southern District of New York for the purpose of inquiring into possible violations of the narcotic laws (R. 80, 93–94, 109–110). That grand jury is still in session and is scheduled to expire in March 1965 (R. 142).

In December 1963, after a lengthy jury trial in the United States District Court for the Southern District of New York, petitioner and four co-defendants were acquitted of conspiracy to violate the Narcotic Drug Import and Export Act, 21 U.S.C. 174 (see R. 26–27), and eleven co-defendants, including Joseph Mogavero and Carmine Locascio, were convicted.[1] At the trial, the only direct evidence against petitioner came from an accomplice, Salvatore Rinaldo. He testified that in 1955 he met petitioner through Mogavero and Locascio

[1] On appeal, the convictions were reversed and a new trial ordered. *United States* v. *Borelli*, 336 F. 2d 376 (C.A. 2).

and was directed by Locascio to meet petitioner the next day. The following day petitioner introduced Rinaldo to one "Johnny", to whom, for about a year thereafter, Rinaldo delivered narcotics (see R. 26–27). Rinaldo also testified that during this period he, Mogavero and Locascio met petitioner in an apartment, and that all of them tested narcotics which were claimed to have been of poor quality (see R. 27).

In February, April, and May 1964, petitioner appeared before the grand jury under subpoena. After answering a few preliminary questions, he refused to answer the remaining questions on grounds of possible self-incrimination (R. 97–108). The questions propounded to petitioner before the grand jury involved the actors and events about which Rinaldo had testified at the trial; the nature of petitioner's employment or source of income, if any; petitioner's acquaintance with a number of individuals; and his knowledge or participation, if any, in the illicit narcotics traffic (R. 97–99, 101–104, 105–108).

On May 14, 1964, the United States Attorney filed in the district court an affidavit requesting the court to direct petitioner to testify and to produce evidence before the grand jury pursuant to a grant of immunity from prosecution under the provisions of the Narcotic Control Act of 1956, 18 U.S.C. 1406 (R. 93–95). The affidavit recited, *inter alia,* that petitioner's testimony was necessary and material to the grand jury's inquiry into possible violations of the narcotic laws and that the application was being made in good faith with the prior approval of the Attorney

General (R. 93–95). On May 15, 1964, after a hearing at which petitioner was represented by counsel, Judge Feinberg told the petitioner that he had absolute immunity from prosecution under 18 U.S.C. 1406 for anything he might disclose to the grand jury and that he could no longer refuse to answer on grounds of possible self-incrimination (R. 19–20). The judge ordered petitioner to reappear before the grand jury and to answer the questions which he had previously refused to answer (R. 23, 109–111).

On July 1, 1964, petitioner reappeared before the grand jury and refused to answer, on grounds of possible self-incrimination, the questions which he had been directed to answer (R. 112–116). On the following day, the grand jury, petitioner and counsel for each side appeared before District Judge Inzer Wyatt (R. 117, 118). Judge Wyatt said that he was not prepared to entertain or conduct a contempt proceeding at that time and that, instead, he would give petitioner "another chance" to answer the questions (R. 120–122). The court told petitioner that he could not rely upon the privilege against self-incrimination because he had "absolute immunity" from prosecution for anything he might say or disclose before the grand jury (R. 122–123). After directing petitioner to answer each question, the court propounded to petitioner the same questions which petitioner had previously refused to answer before the grand jury; petitioner again refused to answer on grounds of possible self-incrimination (R. 123–129).

Later that day, Judge Wyatt signed an order directing petitioner to show cause why he should not be adjudged in contempt of court for his refusal to answer the questions before the grand jury on July 1, 1964, and before the court on July 2, 1964 (R. 3). An affidavit filed by petitioner's counsel recited that the questions propounded to petitioner in each case were improper because they were either not designed to aid the grand jury's inquiry or because they conflicted with the petit jury's not-guilty verdict in the 1963 trial (R. 26–31). Petitioner demanded a trial by jury (R. 30). These points, including the demand for a jury trial, were repeated at the contempt hearing on July 8 and 9 (R. 55–73). Counsel also argued that petitioner's interrogation violated his constitutional protection against double jeopardy (R. 74–77).

The court found petitioner guilty of criminal contempt for his willful disobedience of the court order directing him to testify before the grand jury and for his wilful disobedience of the court order on July 2, 1964, "directly and in the actual presence of the Court" (R. 83). When the court asked government counsel whether he had anything to say on the question of penalty, counsel said, in part (R. 84–85):

> * * * I want to make this reference so the record will be perfectly clear. Castaldi's appearance before the grand jury on these occasions this year was caused only in the most minor way by the trial that he was a defendant in last year in this court. Castaldi has been under investigation by the Federal Bureau of Narcotics for approximately, and at least 15

> years, before the Government * * * ever heard of Rinaldo, the witness who testified against him.

Government counsel also stated that, according to testimony given by one Joseph Valachi before a committee of the United States Senate, petitioner was a member of the Luchesi "family", many of whose members had been convicted of violations of the Federal narcotic laws, so that there was reason to believe he had knowledge of the operation of the narcotics traffic (R. 85–86). After hearing from counsel for the petitioner (R. 86–89) and extending to petitioner his right of allocution (R. 89), the court said (R. 89):

> Mr. Castaldi, I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked you. I am therefore going to provide in the sentence that you may at any time be released from confinement provided you answer the questions.

The court then sentenced petitioner to two years' imprisonment or to serve until the further order of court should the petitioner answer before the grand jury the questions which appear on the record and which he was ordered to answer (R. 89, 131). The court said that if petitioner answered the questions prior to the expiration of his sentence or to the discharge of the grand jury, the further order of the "Court may be made terminating the sentence of imprisonment" (R. 90). Petitioner was thereafter re-

leased on bail pending appeal, and he is presently free on bail.

DISCUSSION

1. Petitioner contends (Pet. 8–10) that inasmuch as he had been acquitted in 1963 on charges of conspiring to violate the narcotic laws, he could not be compelled, under the immunity provisions of the Narcotic Control Act of 1956, to testify before a grand jury investigating possible related violations of the narcotic laws. The fact that petitioner was found not to have been criminally implicated in the particular conspiracy charged in the earlier indictment did not, however, establish that he had no information which would aid the grand jury with respect to other violations of the narcotic laws. A witness who is not guilty of a crime is often able to give valuable information, and petitioner was called as a witness, not as a potential defendant. Nor was the present grand jury investigating the case which had been tried; it was inquiring into other possible offenses on which the prior testimony might have some bearing.

A person who has been convicted of a narcotics offense may be compelled under 18 U.S.C. 1406 to give evidence before a grand jury. *Reina* v. *United States,* 364 U.S. 507; *Piemonte* v. *United States,* 367 U.S. 556. Hence it is clear that mere interrogation concerning narcotics transactions of a person who has been once tried for a narcotics offense does not violate any constitutional protection. This principle is no less applicable to an acquitted defendant than to a convicted one. In either instance, a subsequent prose-

cution for the same offense with which the witness was previously charged would violate the Double Jeopardy Clause, but inquiry concerning either that offense or other related crimes is permissible. And once immunity is extended under Section 1406, the witness' position is no different from that of any person who has never been charged with an offense. If a question erroneously "assumes the truth" (Pet. 9) of the earlier charge made against the witness, he may deny it in his answer. And if this assumption is, in fact, correct (notwithstanding his acquitttal), both the prior trial and the immunity conferred upon the witness protect him against incriminatory use of a truthful answer.

2. There is no merit to petitioner's claim (Pet. 10–12) that he was constitutionally entitled to indictment and trial by jury on the contempt charges. This contention was recently rejected by this Court (*United States* v. *Barnett*, 376 U.S. 681; *Green* v. *United States*, 356 U.S. 165), and presents no issue requiring further review. As shown by the Statement, *supra*, the procedure prescribed by Rule 42(b), F.R. Crim. P., was used in this case, and petitioner had ample notice of the charges and opportunity to defend at the hearing before the district court. Petitioner was not entitled to a jury trial under applicable statutory provisions, as the court below correctly held (Pet. App. 19). See 18 U.S.C. 402, 3691.

3. The sentence in this case contains an explicit provision that it will be reconsidered if petitioner testifies before the grand jury (R. 131). To that ex-

tent it is different from the sentence in *Harris* v. *United States*, No. 526, this Term, certiorari granted, December 14, 1964, where the judge merely indicated orally that he would consider reducing the sentence if the defendant testified.[2] However, unless petitioner testifies before the grand jury expires in March 1965, his two-year sentence will become fixed. Hence we suggest that it would be appropriate to defer action on this petition pending determination of the question, which is involved in *Harris*, as to the power of the court to fix a contempt sentence in excess of that for a petty offense.

Respectfully submitted.

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JANUARY 1965.

[2] The fact that the judge in this case proceeded under Rule 42(b) rather than holding petitioner in contempt summarily under Rule 42(a) is of no significance. The judge explicitly found not only that petitioner disobeyed an order of the court before the grand jury, but that petitioner disregarded the order of July 2 "directly and in the actual presence of the Court" (R. 83). Hence, if presence before the court is significant with respect to the length of sentence, this factor is present in this case as well as in *Harris*.

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—v.—

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Respondent.

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REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

Statement

This memorandum is respectfully submitted in reply to the Memorandum for the United States submitted in this cause. In its memorandum the United States does not oppose the grant of certiorari herein, stating that the issue in this case is the same as in the case of *Harris* v. *United States,* No. 526, this Term, certiorari granted, December 14, 1964, as to the district court's sentencing power in contempt cases. The Solicitor General has suggested that in this case "it would be appropriate to defer action on this petition pending determination of the question, which is involved in *Harris,* as to the power of the court to fix a contempt sentence in excess of that for a petty offense" (p. 9).

For the reasons set forth hereinafter, it is believed that certiorari should be granted in this cause, on the questions presented in the petition, and that this case should be ordered briefed and argued along with the *Harris* case.

Discussion

The undersigned counsel for petitioner Castaldi was appellate counsel for petitioner in the *Harris* case. He was retained by Moses Polakoff, Esq., of the New York bar, the attorney of record for Harris, and he wrote the briefs and argued the appeal in the *Harris* case before the Court of Appeals. He wrote the petition for certiorari and reply memorandum in the *Harris* case. He was retained for all phases of the appeal procedures in said case. He has had a number of cases both in the Court of Appeals and this Court on various aspects of federal contempt cases. He was retained in this case by petitioner Castaldi by reason of the fact that he was appellate counsel in the *Harris* case and in light of his knowledge and experience in federal contempt cases.

When certiorari was granted in the *Harris* case, it was understood and agreed that the undersigned would write the brief and orally argue that case before this Court. Thereafter, and for reasons which have never been made clear to the undersigned, and in which this Court would probably not be interested, petitioner Harris discharged his counsel of record, Moses Polakoff, Esq. and accordingly, without any notice to him, the undersigned ceased to be connected with the *Harris* case. As a result, the opportunity for the undersigned to write the brief and present oral argument before the Court in the *Harris* case was lost.

In several essential respects this case differs from *Harris*. Firstly, here the contempt hearing was conducted under Rule 42(a), F.R.Cr.P., rather than Rule 42(b), as in the *Harris* case. The Court of Appeals considered this to be a distinction without a difference, stating that Castaldi's contempt occurred in the court's presence, before compliance with the court's order, and that he could have been sentenced summarily under Rule 42(a). Secondly, unlike the Harris sentence of one year, the sentence of two years in this case contained a limited purge clause, limited to the life of the grand jury before whom Castaldi appeared. This in effect places a premium on a man exercising his right of appeal, notwithstanding the merit of the appeal, for if ultimately he is unsuccessful in urging Constitutional and legal arguments (as here), ostensibly he loses his right to purge his contempt and reduce his jail sentence. Purge clauses, such as the one in this case, should be reviewed by this Court.

Counsel is aware of the practice of this Court often to defer action on pending petitions for certiorari while considering on the merits one case involving some of the same questions of law. Such practice helps to reduce the enormous volume and burden of pending cases before the Court. However, under the circumstances of this case it is believed that certiorari should be granted and this case should be fully heard on the merits. Counsel is informed that there are a great many cases involving the same questions of federal contempt law on their way to this Court. Many of them are originating in the same court from which both *Harris* and this case came, that is, the Southern District of New York. The Court therefore may very well wish to consider a brief and hear oral argument from the same counsel who handled all of the appeal procedures up to this point in both *Harris* and this case.